Supreme Court, U.S.
FILED

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No. 98-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER, 1997

GERALD GEE,

Petitioner,

v.

STATE OF FLORIDA AND BOARD OF REGENTS
OF THE STATE OF FLORIDA,

Respondents.

On Petition For A Writ Of Certiorari To
The First District Court Of Appeals
For The State of Florida

GERALD GEE'S PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In determining the preclusive effect of a judgment in a federal action pursuant to federal common law, should *res judicata*, or claim preclusion, be applied to a claim that could not have been brought in the federal action because of Eleventh Amendment immunity?

2. In determining the preclusive effect of a judgment in a federal action pursuant to federal common law, should collateral estoppel, or issue preclusion, be applied to an issue that was not resolved in the federal action?

PARTIES TO THE PROCEEDING

The parties to the litigation are:

Plaintiff (Petitioner):

Gerald Gee

Defendants (Respondents):

State of Florida
Board of Regents of the State of Florida

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OPINIONS BELOW

The per curiam affirmance of the First District Court of Appeals for the State of Florida is reprinted in Appendix A. The order denying petitioner's motion for rehearing, rehearing *en banc*, or certification, dated June 5, 1998, is reprinted in Appendix C.

The June 26, 1997 order granting dismissal with prejudice by the Circuit Court of the Second Judicial Circuit in and for Leon County is reprinted in Appendix B.

JURISDICTION

The judgment of the First District Court of Appeals was rendered on April 20, 1998. A timely motion for reconsideration, reconsideration *en banc*, or certification was denied on June 5, 1998. The Court has jurisdiction pursuant to 28 U.S.C. § 1257.

RELEVANT LAWS

The Eleventh Amendment to the United States Constitution states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State

STATEMENT OF THE CASE

The underlying facts of this case are set forth in the petition of Gerald Gee to this Court in Supreme Court Case No. 98-44. Petitioner refers to them and incorpo-

rates them by reference. Only the additional facts necessary to determine this matter are set forth here.

After commencing his action in federal court (the "federal action") in January 1995, Gee commenced administrative proceedings under both Title VII and the Florida Civil Rights Act (the "FCRA"), Fla. Stat. §§ 760.01 - 760.11. On April 2, 1996 -- well over one year after the federal action was commenced, and just before discovery was to have been completed in that action -- Gee received a notice of right to sue letter. On July 1, 1996, Gee commenced an action in Florida state court, in the Circuit Court of the Second Judicial Circuit in and for Leon County.

The state court complaint alleged race discrimination in employment by Florida A&M University ("FAMU") in violation of Title VII (42 U.S.C. §§ 2000e, *et seq.*) and the FCRA, both in suspending and punishing plaintiff for his speech (as alleged in the federal action) and in denying plaintiff tenure.

Shortly after the commencement of this action, defendants removed the case to federal court. Gee moved to remand. In an opinion and order dated September 30, 1996, Judge William Stafford of the U.S. District Court for the Northern District of Florida granted that motion. App. D. Judge Stafford recognized that the Eleventh Amendment precluded Gee's state law claim from being heard in federal court. App. D1-D2. The remainder of his opinion discussed the split in the law between those cases holding that the federal removal statute required remand of the entire action when one of the claims was barred by the Eleventh Amendment, and those cases holding that a partial remand of only the barred claim was

possible.[1] Judge Stafford concluded that the first line of cases was correct, and remanded the entire action back to state court "for lack of subject matter jurisdiction." App. D5.

Gee's federal action, which included a claim for a violation of Gee's Equal Protection right to be free of state-sponsored race discrimination as well as for violations of Gee's First Amendment and Due Process rights, had been brought against various individuals in their official and individual capacities through 42 U.S.C. § 1983. (The race discrimination claim also asserted a violation of 42 U.S.C. § 1981.) As described in the Petition in *Gee v. Humphries*, Sup. Ct. No. 98-44, those individuals moved for summary judgment on various grounds (including qualified immunity for the damages claims). The Court granted those motions with respect to Gee's First Amendment and Due Process claims. However, it denied the motions with respect to Gee's Equal Protection claim alleging race discrimination, concluding that there were issues of fact concerning defendants' motive remaining. *See* Petition in *Gee v. Humphries*, Sup. Ct. No. 98-44, App. B9-B10.

Because Gee wanted to immediately appeal the order granting summary judgment against him on First Amendment and Due Process grounds, and because the individual defendants had asserted, and had indicated that they would continue to assert, the defense of qualified immunity in the federal action (a defense unavailable to the state defendants in the state court action), Gee immediately dismissed his Equal Protection claim with prejudice.

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[1] This Court resolved that split in *Wisconsin Department of Corrections v. Schact*, 118 S. Ct. 2047 (1998).

Gee's decision to voluntarily dismiss also relied upon Judge Stafford's ruling that the federal courts lacked subject matter jurisdiction over his state court claims, thus precluding the doctrine of *res judicata* from applying to those legal theories (even if it did apply to the claims voluntarily dismissed with prejudice). After the final judgment was entered, Gee appealed the First Amendment and Due Process claims to the Eleventh Circuit.

After dismissal of the federal court action, defendants in the state court case moved to dismiss Gee's state court claims on the grounds of *res judicata* and collateral estoppel. Gee opposed that motion, and specifically pointed out that the preclusive effect of a federal judgment was a matter of federal law. *See* n.2, *infra*. In an order dated June 26, 1997, the Circuit Court of the Second Judicial Circuit for Leon County granted that motion. App. B. The Court's order based dismissal upon "the doctrines of *res judicata* and collateral estoppel."

Gee timely appealed that order to the First District Court of Appeals for the State of Florida, and once again asserted that federal law governed the issue. *See* n.2, *infra*. In an order dated April 20, 1998, that Court affirmed the lower court's order, without opinion. App. A. Gee timely moved for rehearing; that motion was denied in an order dated June 5, 1998. App. C.

Because the First District Court of Appeals did not write an opinion, the Florida Supreme Court lacks the jurisdiction to review its judgment. *The Florida Star v. B.J.F.*, 530 So. 2d 286, 288 n.3 (Fla. 1988). *See also Palmore v. Sidoti*, 466 U.S. 429, 431 (1984). Accordingly, the First District Court of Appeals is "the highest court of a State in which a decision could be had" in this matter.

28 U.S.C. § 1257.

REASONS FOR GRANTING THE WRIT

The preclusive scope of a federal judgment in a federal question case is a matter of federal common law. *Heck v. Humphrey*, 512 U.S. 477, 488 n.9 (1994).[2] Either basis (collateral estoppel or *res judicata*) for the judgments of the Courts below creates an interpretation of federal common law wholly out-of-step with fundamental principles of preclusion, as well as circuit courts of appeals and other state courts of last resort.

A. This Court Should Grant The Petition To Resolve Whether Principles Of *Res Judicata* Applicable To Federal Judgments Preclude Claims That Could Not Have Been Brought In The Federal Action Because Of A Jurisdictional Bar

As a general rule, of course, principles of *res judicata*, or claim preclusion, bar not only claims that were brought in the first action, but also claims that could have been brought, but were not, arising out of the same general factual pattern as the claims brought. Restatement (Second) of Judgments § 24 (1982).

But the general rule has exceptions. The Restatement recognizes a series of exceptions to the general rule

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[2] Gee's briefs in the Courts below noted that federal law was applicable. *E.g.*, Initial Brief of Appellant to First District Court of Appeals, p. 6, n.4; Plaintiff's Memorandum In Opposition To Defendants' Summary Judgment Motion, p. 6, n.5. Defendants did not dispute this point.

of Section 24 in Section 26. The relevant exception here is set forth in Section 26(1)(c), which provides that "the general rule of § 24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant" where "[t]he plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts . . . "

The Restatement explains this exception as follows:

> The general rule of § 24 is largely predicated on the assumption that the jurisdiction in which the first judgment was rendered was one which put no formal barriers in the way of a litigant's presenting to a court in one action the entire claim including any theories of recovery or demands for relief that might have been available to him under applicable law. When such formal barriers in fact existed and were operative against a plaintiff in the first action, it is unfair to preclude him from a second action in which he can present those phases of the claim which he was disabled from presenting in the first.

Restatement (Second) Judgments § 26, Comment c (1982). *See also Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 382 (1985) (reversing judgment dismissing Sherman Act claim because of prior state court lawsuit; "claim preclusion generally does not apply where 'the plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy because of the limitations on the subject matter of the courts'" *quoting* Restatement (Second) of Judgments, § 26(1)(c) (1982)).

No one disputes that the Eleventh Amendment precluded Gee from bringing his claim under the FCRA in federal court. Indeed, Judge Stafford held that the entire state court action could not be brought in federal court.[3] Thus, assuming *arguendo* that the individual defendants in Gee's federal action are the "same" as the state defendants in his state court action, and the facts underlying each suit were precisely the same, the Restatement would not preclude Gee's state court theories because those theories could not have been brought in the first action (*i.e.*, the federal action).

In applying federal common law, virtually all courts that have considered the matter have followed the Restatement on this point. The following federal circuit court cases are on point. *E.g.*, *Bio-Technology General Corp. v. Genentech, Inc.*, 80 F.3d 1553, 1563 (Fed. Cir. 1996) (adjudication before International Trade Commission concerning patent infringement or validity cannot claim preclusive effect in federal district court, since ITC's jurisdiction is limited) (citing Restatement); *Computer Associates International v. Altai, Inc.*, 126 F.3d 365, 370 (2d Cir. 1997) (loss of Copyright Act suit in federal court did not bar suit under French copyright law in France, where one of the defendants was beyond the reach of the U.S. courts; "[e]ven where a second action arises from some of the same factual circumstances that gave rise to a prior action, *res judicata* is inapplicable if formal jurisdic-

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[3] It is true that, under this Court's later decision in *Wisconsin Dep't of Corrections v. Schacht*, Judge Stafford could have retained jurisdiction over the Title VII claim only. But a dismissal based upon an erroneous jurisdictional barrier is treated by the Restatement precisely as a real jurisdictional barrier. Restatement (Second) Judgments § 26, Comment d (1982).

tional or statutory barriers precluded the plaintiff from asserting its claims in the first action"); *Martin v. Garman Const. Co.*, 945 F.2d 1000, 1003 (7th Cir. 1991) (NLRB ruling that employer did not commit unfair labor practice did not bar union's ERISA suit, since NLRB lacked jurisdiction over ERISA claims) (citing Restatement), *cert. denied*, 502 U.S. 1122 (1992); *Devils Lake Sioux Tribe v. North Dakota*, 917 F.2d 1049, 1056 (8th Cir. 1990) (refusing to apply claim preclusion to Indian claim of title because federal Indian Claims Commission lacked jurisdiction over that claim); *Browning v. Navarro*, 887 F.2d 553 (5th Cir. 1989) ("It is black letter law that a claim is not barred by res judicata if it could not have been brought. If the court rendering judgment lacked subject matter jurisdiction over a claim or if the procedural rules of the court made it impossible to raise a claim, then it is not precluded."), *citing Nilsen v. City of Moss Point*, 674 F.2d 385 (5th Cir. 1982); *Kale v. Combined Insurance Co. of America*, 924 F.2d 1161, 1167 (1st Cir. 1991) ("the rule requiring all claims arising from a single cause of action to be asserted in a single lawsuit will not apply if the plaintiff was unable to assert a particular claim or theory in the original case 'because of the limitations on the subject matter jurisdiction of the courts'" *quoting* Restatement (Second) of Judgments, § 26(1)(c)(1982)).

Other than the Courts below, state courts considering the preclusive effect of a federal judgment have arrived at the same conclusion. *Pope v. City of Atlanta*, 240 Ga. 177, 240 S.E.2d 241, 243 (1977), *cert. denied*, 440 U.S. 936 (1979) (dismissal on merits of federal constitutional challenge did not bar subsequent state court suit alleging violations of state constitution; "if the federal court would have *refrained* from exercising its pendent jurisdiction over the state claims, then the subsequent suit

in state court would *not be barred* by res judicata" (emphasis in original)); *Terrebonne Fuel & Lube Co. v. Placid Refining Co.*, 666 So.2d 624, 634 (La. 1996) (federal bankruptcy court's refusal to exercise supplemental jurisdiction over state law claims, even though it had such jurisdiction, "negate[s] a finding of res judicata" in subsequent state court suit, since res judicata does not apply "when the federal court clearly would not have had jurisdiction to entertain the omitted state claim, '*or having jurisdiction, clearly would have declined to exercise it as a matter of discretion*'") (emphasis in original), *quoting Reeder v. Succession of Palmer*, 623 So. 2d 1268, 1273 (La. 1993); *Watkins v. Resorts International Hotel & Casino*, 124 N.J. 398, 591 A.2d 592, 599 (1991) ("If, on the other hand, a claim could not have been presented in the first action, then it will not be precluded in a later action" *citing* Restatement); *San Antonio School Dist. v. McKinney*, 936 S.W.2d 279, 281 (Tex. 1996) (under federal claim preclusion law, "res judicata will not apply if the federal court (1) lacked jurisdiction over the omitted state law claims, or (2) possessed jurisdiction over the omitted state law claims but would clearly have declined to exercise that jurisdiction as a matter of discretion"); *Hughes v. Trans World Airlines*, 336 A.2d 572, 578 (Del. 1975) (dismissal by Supreme Court of Sherman Act lawsuit did not bar subsequent state court lawsuit alleging breach of fiduciary duty since there was no evidence, only "speculation," that the courts would have been willing to exercise pendent jurisdiction over the state claims); *Anderson v. Phoenix Investment Counsel of Boston, Inc.*, 387 Mass. 444, 440 N.E.2d 1164, 1168 (1982) ("if the Federal court in the first action would clearly not have had jurisdiction to hear the State claim or if, having jurisdiction, clearly would have declined to exercise it as a matter of discretion, then a second action in a State court should not

be precluded"), *citing Pope v. City of Atlanta, supra*; *Silver v. Queen's Hospital*, 629 P.2d 1116, 1122-23 (Haw. 1981) ("where it is clear that a federal court would have refrained from exercising pendent jurisdiction over state claims, such as where a jurisdictional bar operates, or where the federal district has exercised its discretion not to hear them," then "those state claims [will] not be barred in a subsequent state court suit"), *citing Pope v. City of Atlanta, supra*.

Thus, the reliance of the Courts below on principles of *res judicata* demonstrates that the Florida courts have applied federal principles of preclusion differently than the vast majority of courts. This Court should grant the petition to resolve this conflict.

B. This Court Should Grant The Petition To Resolve Questions Concerning Whether Principles Of Collateral Estoppel Applicable To Federal Judgments Preclude Issues That Were Not Resolved In The Federal Action

The trial court dismissed Gee's action on both *res judicata* and collateral estoppel grounds. While relying on the former reflects the Florida courts' refusal to adopt a well-established exception to a general rule, relying on the latter reflects the Florida courts' decision to decline to adopt a general rule itself.

Unlike *res judicata*, collateral estoppel, or issue preclusion, only applies to claims that were actually resolved in the earlier action. The Restatement so states. Restatement (Second) of Judgments, § 27, comment e (1982) ("A judgment is not conclusive in a subsequent action as to issues which might have been but were not

litigated and determined in the prior action"). In developing the federal common law of issue preclusion, virtually every court (including this one) has adopted the "actually decided" standard. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979) ("the doctrine of collateral estoppel . . . precludes relitigation of issues actually litigated and necessary to the outcome of the first action"); *Levy v. Kosher Overseers Ass'n of America*, 104 F.3d 38, 41 (2d Cir. 1997) ("In order to apply the doctrine of collateral estoppel to bar litigation of an issue . . . 'the issue in the prior proceeding must have been actually litigated and actually decided'"), *quoting Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 44 (2d Cir. 1986); *Hawksbill Sea Turtle v. F.E.M.A.*, 126 F.3d 461, 475 (3d Cir. 1997) (factors that must be present to apply the doctrine of collateral estoppel include "the issue [being] actually decided in a decision that was valid, final, and on the merits"); *Brown v. United States*, 508 F.2d 618, 621 (3d Cir. 1974) ("We agree . . . that the . . . issue presented in the instant case was also squarely presented to the court in [earlier case]. However, this fact alone does not make collateral estoppel operative since that doctrine only precludes 'the relitigation of issues actually decided in former judicial proceedings'"), *cert. denied*, 422 U.S. 1027 (1975); *Gilday v. Dubois*, 124 F.3d 277, 283 (1st Cir. 1997) (issue must have been "actually decided"); *Schendel v. Curtis*, 83 F.3d 1399, 1405 (Fed. Cir. 1996) (same); *Olchowik v. Sheet Metal Workers*, 875 F.2d 555, 557 (6th Cir. 1989) (same). *See generally* 18 Wright & Miller, *Federal Practice and Procedure*, § 4420 (1981) ("issue preclusion . . . [is] limited to matters that have actually

been decided").[4]

Gee's discrimination claim in the federal action was never resolved by the Court because he voluntarily dismissed it with prejudice. As the Restatement observes, issue preclusion does not apply to voluntary dismissals. *Schendel v. Curtis*, 83 F.3d at 1405 ("For issue preclusion to apply here . . . that issue must have been . . . actually decided. . .'In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated,' and thus issue preclusion does not apply" *quoting* Restatement (Second) of Judgments, § 27, comment e (1982)).

Again, this court, and many other courts, have reached the same conclusion, reasoning that consent judgments or voluntary dismissals do not result in issue preclusion because they contain no findings. *E.g.*, *Lawlor v. Screen Services Corp.*, 349 U.S. 322, 327 (1955) ("the judgment was unaccompanied by findings and hence did not bar the parties on any issue. . .which might arise in connection with another cause of action"); *Pelletier v. Zweifel*, 921 F.2d 1465, 1501 (11th Cir. 1991) ("Since such a judgment [a dismissal with prejudice] is unaccompanied by findings, it does not, however, collaterally estop the plaintiff from raising issues that might have been litigated if the case had proceeded to trial"), *cert. denied*, 502 U.S. 855 (1991), *citing Lawlor*. *Accord* 1B *Moore's Federal Practice*, ¶ 0.443[3] at III.-575 (1996) ("[J]udg-

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[4] This Court has recognized that the same limit applies to issue preclusion resulting from state court judgments. *Brown v. Felsen*, 442 U.S. 127, 139 n.10 (1979) ("collateral estoppel treats as final only those questions actually and necessarily decided in a prior suit"), *citing Montana v. U.S.*, 440 U.S. 147, 153 (1979).

ments upon stipulations[] should not be given conclusive effect under the doctrine of collateral estoppel").[5] Of course, Judge Hinkle's decision *denying* defendants' motion for summary judgment on Gee's Equal Protection claim in federal court has no collateral estoppel effect either. *Cf. Schiro v. Farley*, 510 U.S. 222, 232-33 (1994) (jury's failure to return verdict on "intentional murder" charge had no collateral estoppel effect because defendant could not demonstrate that there was an ultimate determination of fact in his favor).

CONCLUSION

For the reasons stated, this Court should grant the petition.

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[5] *See also E.E.O.C. v. Jacksonville Shipyards*, 696 F. Supp. 1438, 1442 (M.D. Fla. 1988) ("While 'the stipulation of dismissal with prejudice constitutes a final judgment for purposes of res judicata (claim preclusion) [,] [it does] not for the purpose of collateral estoppel (issue preclusion)'" *quoting Sullivan v. EASCO Corp.*, 662 F. Supp. 1396, 1408 (D. Md. 1987)); *St. Vincent's Hosp. and Medical Center of New York v. Division of Human Rights*, 553 F. Supp. 375, 379 (S.D.N.Y. 1982) (plaintiff's dismissal with prejudice of her federal suit did not collaterally estop pending state proceedings, since "voluntary dismissal does not reflect any determination by the Court of any fact or issue before it").

APPENDICES

APPENDICES

A Opinion Of The First District Court Of Appeals, State Of Florida Affirming The Judgment Of The Circuit Court (April 20, 1998) A1

B Order Of The Circuit Court Of The Second Judicial Circuit, In And For Leon County, State of Florida, Dismissing Action With Prejudice (June 26, 1997) B1

C Order Of The First District Court Of Appeals, State Of Florida, Denying Motion For Rehearing, Certification, Or Rehearing En Banc (June 5, 1998) C1

D Order Of United States District Court For The Northern District Of Florida Remanding Case To State Court (September 20, 1996) D1

APPENDIX A

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

GERALD GEE,

Appellant,

v.

STATE OF FLORIDA, BOARD OF REGENTS,

Appellee.

CASE NO. 97-3061

_____/

Opinion filed April 20, 1998.

An appeal from the Circuit Court for Leon County. William L. Gary, Judge.

Marie A. Mattox, Mattox & Hood, P.A., Tallahassee, for Appellant.

David K. Miller, of Broad & Cassel, Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED.

MICKLE and DAVIS, JJ., MCDONALD, PARKER LEE, SENIOR JUDGE, Concur.

APPENDIX B

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

GERALD GEE,

Plaintiff,

vs. Civil Action No. 96-3741

STATE OF FLORIDA, BOARD OF REGENTS,

Defendant.

_____/

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND DISMISSAL WITH PREJUDICE

THIS CAUSE having come on to be heard before this Court on Monday, June 23, 1997, upon Defendant, State of Florida, Board or Regents' Motion for Summary Judgment in the above styled cause, and after having heard arguments of counsel, having reviewed Defendant's Motion for Summary Judgment, Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, Plaintiff's Motion to Strike Motion for Summary Judgment and Supplemental Response, and Defendant's Reply to Motion to Strike and Supplemental Response, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED as follows:

1. Defendant's Motion for Summary Judgment is GRANTED, based on the doctrine of *res judicata* and collateral estoppel.

2. Plaintiff's Motion to Strike is DENIED.

3. Plaintiff's claims are thereby dismissed with prejudice. Plaintiff shall take nothing by this suit and shall go hence without day.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 26th day of June, 1997.

/s/_____
William L. Gary
Circuit Court Judge

APPENDIX C

C1

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (850) 488-6151

June 5, 1998

CASE NO: 97-03061

L.T. CASE NO. 96-3741

Gerald Gee v. State of Florida, Board of Regents

Appellant (s), Appellee(s).

BY ORDER OF THE COURT:

Appellant's motions for rehearing, for certification, and for rehearing en banc, filed May 4, 1998, is DENIED.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

/s/_____

Jon S. Wheeler, Clerk

Seal

By: /s/_____
Deputy Clerk

Copies:

Marie A. Mattox
David Allen Roberts
M. Stephen Turner
David K. Miller

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

GERALD GEE,

Plaintiff,

4:96cv329-WS

vs.

STATE OF FLORIDA,
BOARD OF REGENTS,

Defendant.

_____/

ORDER REMANDING CASE TO STATE COURT

Plaintiff, Gerald Gee ("Gee"), initially filed this case in the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, against his former employer, a state agency. The agency, Florida Board of Regents ("BOR"), removed the case to this court under Title 28, United States Code, Section 1441, subsections (a) and (b) of which authorize removal of cases founded on a claim or right arising under federal law.

Before the court at this time is Gee's motion to remand his case to state court (doc. 6). Gee suggests that the case must be remanded because his complaint includes not only a federal claim but also a state law claim that, under the Eleventh Amendment, is not justiciable in federal court. See Pennhurst State Sch. & Hosp. v.

Halderman, 465 U.S. 89, 104 S. Ct. 900, 79 L.Ed.2d 67 (1984) (holding that a claim in federal court against a state agency under state law is barred by the Eleventh Amendment even when the claim is brought into federal court under pendent or supplemental jurisdiction).

DISCUSSION

Together, subsection (a) and (b) of the federal removal statute permit removal of "[a]ny civil action of which the district courts of the United States have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States." 28 U.S.C. S 1441 (b).[1] Some courts have construed these subsections to mean that remand of an entire action is required if any part of the action is barred by the Eleventh Amendment. See, e.g., Gorka v. Sullivan, 82 F.3d 772 (7th Cir. 1996); Frances J. v. Wright, 19 F.3d 337 (7th Cir.), cert. denied, 115 S. Ct. 204, 130 L.Ed.2d 134 (1994); McKay v. Boyd Constr. Co., 769 F.2d 1084 (5th Cir. 1985); Miles v. Kilgore, 928 F. Supp. 1071 (N.D. Ala. 1996) (adopting the reasoning of Gorka and Frances J.); Ta v. Neimes, F. Supp. 977 (W.D. Tex. 1996); Cotton v. South Dakota, 843 F. Supp. 564 (D.S.D 1994). Other courts have determined that sections 1441(a) and 1441(b) permit them to remand those claims and/or defendants protected by the Eleventh Amendment but to retain jurisdiction over claims otherwise justiciable in

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[1] Section 1441 (a) provides that "[e]xcept as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

federal court. See, e.g., Kruse v. Hawaii, 68 F.3d 331 (9th Cir. 1995); Henry v. Metro. Sewer Dist., 922 F.2d 332 (6th Cir. 1990); Texas Hosp. Ass'n v. Nat'l Heritage Ins. Co., 802 F. Supp. 1507 (W.D. Tex. 1992).

The meaning of the phrase "civil action" lies at the heart of the courts' disagreement about remand in cases removed under sections 1441(a) and 1441(b). In the complete-remand line of cases, courts have reasoned that the phrase "civil action" denotes the entirety of the proceedings in question, not merely bits and pieces of those proceedings. Cotton, 843 F. Supp. at 567; See also Arango v. Guzman Travel Advisors Corp., 621 F.2d. 1371, 1376 (5th Cir. 1980) (interpreting the phrase "civil action" as used in section 1441 to mean "the entirety of the proceedings in question, not merely those aspects involving discrete federal claims or parties"). Under this reasoning, removal of a case that includes a claim or claims barred by the Eleventh Amendment is improper in the first instance because the court does not have original jurisdiction over the entire "civil action."

Exemplifying the partial-remand cases, the court in Texas Hospital Association, 802 F. Supp. at 1507, gave three reasons for rejecting the analysis of the complete-remand line of cases. First, the district court observed that when a case is filed initially in federal court, the court may dismiss just those claims or defendants protected by the Eleventh Amendment without losing jurisdiction over the entire action. It would be "anomalous," the court surmised, "to reach a different result merely because the case was initially filed in state court." 802 F. Supp. at 1515. Second, the court said:

[W]hile it is true that Section 1441 "does

> not countenance the removal of bits and pieces of cases," Simmons, 740 F. Supp. at 786-87 (emphasis added), it does not generally preclude federal courts from remanding bits and pieces of cases if a court finds that some, but not all, claims belong in state court or there are other reasons to separate the state and federal claims.

Texas Hosp. Ass'n, 802 F. Supp. at 1515 (emphasis in original). Finally the Texas court noted the Supreme Court's purported preference for federal court vindication of federal rights. Influenced by each of these three factors, the court in Texas Hospital Association refused to find that it lacked jurisdiction over claims that were not barred by the Eleventh Amendment merely because such claims were joined with claims that were barred by the Eleventh Amendment. Apparently satisfied that removal in the first instance was proper, the Texas district court concluded that partial, rather than full, remand was appropriate.

This court finds more persuasive the analysis set out in the Frances J. line of cases, where courts correctly recognized that removal is a statutory right that is to be strictly construed, see Cotton, 843 F. Supp. at 568 (citing Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108-109, 91 S. Ct. 868, 85 L.Ed. 1214 (1941)); where courts properly focused on the propriety of removal before they turned to the question of whether remand should be full or partial given Eleventh Amendment concerns, see Frances J., 19 F.3d at 341 (finding the issue to be the scope of a federal court's removal jurisdiction under section 1441(a) and not the jurisdictional scope of the Eleventh Amendment); and where courts did not concern themselves

with what they would have done if the matter had been filed originally in federal court and what they could have done assuming removal itself was proper.

Consistent with the reasoning of the courts in Frances J. and its progeny, this court finds that removal of this case was not authorized under sections 1441(a) & 1441(b). Without such authorization, the court must remand the entire case for lack of subject matter jurisdiction.

Accordingly, it is ORDERED:

1. Plaintiff's motion for remand (doc. 6) is GRANTED.

2. This action shall be remanded to the Circuit Court, Second Judicial Circuit of the State of Florida in and for Leon County. The clerk shall send a certified copy of this order of remand to the Clerk of the Circuit Court in and for Leon County.

DONE AND ORDERED this 30th day of September, 1996.

/s/_____
William Stafford
Senior United States District Judge

Supreme Court, U.S.
FILED
OCT 15 1998
CLERK

No. 98-391

In The

Supreme Court of the United States

October Term, 1998

GERALD GEE,

Petitioner,

vs.

STATE OF FLORIDA BOARD OF REGENTS

Respondent.

On Petition for Writ of Certiorari to the First District Court of Appeal of Florida

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent disputes that the Petitioner's statement of the questions presented accurately reflects the issues presented and ruled on in the state court. Petitioner erroneously contends in his first question that the state court dismissed his state statutory claim based on claim preclusion. This question does not require the Court's consideration, because the state court's decision was based solely on issue preclusion. Petitioner has not sought review of the dismissal of his federal statutory claim, which the state court dismissed based on both issue preclusion and claim preclusion.

The only question presented and decided in the state court for which Petitioner seeks review is as follows:

Whether issue preclusion bars Petitioner's state law employment discrimination claim, after a federal court dismissed his federal law employment discrimination claim with prejudice.

LIST OF PARTIES

Plaintiff (Petitioner)

GERALD GEE

Defendant (Respondent)

STATE OF FLORIDA, BOARD OF REGENTS

The Board of Regents is an agency of the State of Florida. The State of Florida was not a separate party in the state court proceedings below.

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STATEMENT OF THE CASE

Introduction. This is Petitioner Gee's second petition for certiorari in this term. The Court denied his initial petition for certiorari in *Gee v. Humphries et al.*, Case 98-44 (U.S. Sup. Ct. 1998) (App. 5). This companion case differs only slightly, in that it is the product of Gee's failed maneuver to relitigate in state court an issue that was dismissed with prejudice in his federal court action.

The Respondent Board of Regents adopts the brief in opposition to the petition in Case No. 98-44 as a more thorough discussion of the underlying facts, but summarizes the particular facts relevant to this case below.

Federal court action. The background of the case is concisely set forth in the federal District Court's findings in its order on cross motions for summary judgment in *Gee v. Humphries et al.*, Case No. 95-40031RH (N.D. Fla. Dec. 3, 1996) (R 1-46, 2-292) (App. 1).

Gee was a non-tenured white faculty member teaching public relations at Florida A and M University, a historically black university. Under state university rules, a faculty member's continued employment depends on his or her achieving tenure within six years. Shortly before his tenure application was to be considered, the faculty members who supervised Gee warned him that he appeared to be a weak candidate for tenure. (App. 1 at 2a).

A few days later, Gee interrupted a pre-class discussion among his black students, and used a racial slur in comments suggesting that the students were not motivated. This speech caused immediate disruption among the listeners and led to an extended controversy in which a number of students complained

about the remarks. The University allowed Gee to remain in his position during a year long investigation, then suspended him for two weeks. (App. 1 at 2a-3a).

The University later recommended that Gee not be offered tenure (in effect a lifetime contract to teach there). The State Board of Regents, which supervises the state university system, approved this recommendation. Gee's failure to achieve tenure resulted in the automatic non-renewal of his teaching contract under university regulations. (App. 1 at 4a; *see also* Rule 6C3-10.211(5)(a), Fla. Adm. Code).

Gee sued the University officials and the State Board of Regents in federal court, alleging they had violated his rights to free speech, due process and equal protection. After discovery was complete, each party filed a motion for summary judgment. The federal court made extensive findings in favor of the Defendants, that the University had acted appropriately in suspending Gee for his racially derogatory remarks (App. 1 at 6a); that as a matter of common sense no employer would tolerate this type of remark (*id.* at 7a-8a); and that Gee could not possibly have thought he was free to direct these remarks with impunity (*id.* at 8a). The court also determined that Gee had abandoned his opportunity to challenge his suspension under adequate state law procedures (*id.* 8a). The court granted summary judgment for Defendants on the free speech and due process claims.

Gee's remaining equal protection claim asserted that other persons in the university community had used the same racially derogatory words in different contexts without incident. He cited a letter by the University president referring to him as a "white professor" as evidence that his race was the primary factor on which the recommendation to deny was based. The court noted the race of the speaker (Gee) may affect the meaning

and import of a racial vulgarity, so that the president's letter could be explained as simply factual and as nondiscriminatory for this reason. The court concluded that although Gee could bring this claim to trial, his evidence of discrimination was "thin." (App. 1 at 10a).

Gee was facing a bench trial on his equal protection claim before the same judge who had dismissed his other claims and admonished that his evidence on this claim was "thin." Gee recognized that the court was not likely to find the same evidence was in his favor at trial. Moreover, until this last claim was tried and determined, Gee could not appeal the dismissal of his free speech and due process claims.

Gee therefore decided to abandon his equal protection claim, and filed a motion to dismiss the equal protection claim, with or without prejudice. (App. 2). Gee admitted that he wanted to avoid the cost of trial and that "legal claims dismissed with prejudice cannot be relitigated." (App. 2 at 15a).[1]

The Board of Regents and other Defendants would not agree to a dismissal without prejudice. Gee then stipulated that the equal protection claim would be dismissed with prejudice. (R 1-65) (App. 3). In accordance with this stipulation, the federal court entered a final judgment dismissing the equal protection claim with prejudice. (R 1-68) (App. 4).

Gee then appealed the dismissal of the free speech and due process claims. The Eleventh Circuit affirmed the judgment without opinion and this Court denied review. *Gee v. Humphries et al.*, 141 F.3d 1189 (11th Cir. 1998), *cert. den.*, Case No. 98-44 (U.S. Sup. Ct. 1998).

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1. This Court may notice documents in the record of the companion case (Case No. 98-44), even if they were not in the record of this case. *E.I. DuPont de Nemours & Co., Inc. v. Cullen*, 791 F.2d 5 (1st Cir. 1986); *MacMillan Bloedel Ltd. v. Flintkote Co.*, 760 F.2d 580 (5th Cir. 1985).

State court action. Gee submitted his federal court complaint to the Equal Employment Opportunity Commission and the Florida Commission on Human Relations as his administrative charges that the Board of Regents had violated equal employment rights under Title VII of the Civil Rights Act and Chapter 760, Florida Statutes, the Florida Civil Rights Act (FCRA). (R 1-88-113). When these administrative review processes were deemed completed upon the passage of time, Gee brought his Title VII and FCRA claims in the state court.

Gee's statutory employment discrimination claims in state court presented the same fact issues as his equal protection claim in federal court. Gee admitted that the issues were the same (R 1-78, 82), and his petition to this Court does not contend otherwise.

The Board of Regents moved for summary judgment in the state court on grounds that the federal court's judgment of dismissal precluded Gee from relitigating any employment discrimination issues. (R 1-114-26). The state trial court granted a final summary judgment in favor of the Board of Regents on both the Title VII and FCRA claims. (R 2-310).

Gee appealed this judgment to the Florida First District Court of Appeal. The Board of Regents relied on issue preclusion as the reason for barring the FCRA claim, and did not rely on claim preclusion to bar this state law claim. The Board cited claim preclusion only as an additional reason to bar Gee's Title VII claim. See excerpt from the Board of Regents' brief to the District Court of Appeal (App. 6); excerpt from the Board of Regents' response to Gee's motion for rehearing in the District Court of Appeal. (App. 8).

The District Court of Appeal affirmed the judgment of dismissal without opinion, and denied Gee's motion for rehearing without opinion. (App. 7, 9).

Gee's petition to this Court apparently accepts that his Title VII claim is precluded by the stipulated federal court judgment of dismissal with prejudice. He asserts that only the state law (FCRA) claim is not precluded.

REASONS FOR DENYING THE WRIT

The Court should deny certiorari in this case for each of the following reasons:

1. The state court's memorandum affirmance without an opinion presents no substantial federal issue and does not conflict with any other appellate decisions.

2. The state court decision involves a state employee's claim against a state university under state law, and involves no substantial federal law issue or compelling national interest that requires review.

3. The state court decision is based on the intent of the parties to preclude further litigation, and on Gee's unique strategy of litigating the issue to the stage of judicial findings, then agreeing to dismiss the issue with prejudice upon adverse findings, in order to save trial costs and appeal his other claims which he felt were more promising. This decision presents no important federal question or conflict of decisions.

ARGUMENT

I.

THE STATE COURT'S AFFIRMANCE WITHOUT AN OPINION DOES NOT PRESENT ANY IMPORTANT FEDERAL LAW ISSUE OR CONFLICT WITH ANY OTHER APPELLATE DECISION.

The decision below is a per curiam affirmance without an opinion. There is no facial conflict among appellate decisions, and thus no need for the Court to exercise review to maintain uniformity of decisions. In such cases, the Court normally declines to exercise review. Sup. Ct. Rule 10(b). *See NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 163-64 (1975).

II.

NO IMPORTANT FEDERAL LAW ISSUE IS PRESENTED IN THE UNDERLYING RECORD.

Even if this Court looks beyond the face of the decision below, this case presents no substantial federal law issue that requires vindication or uniformity on the national level. The decision below involves a state court adjudicating a state employee's claim against a state university under state law.

Petitioner cites *Heck v. Humphrey*, 512 U.S. 477 (1994), as authority that a federal issue controls this case. In *Heck*, the Court was presented a completely different issue, whether a federal court judgment in favor of a state prisoner in a Section 1983 action would have preclusive effect on the prisoner's subsequent federal constitutional claims in state court post-conviction proceedings. The Court observed in dicta that state courts are bound by federal rules in determining the preclusive

effect of federal court decisions on ***federal*** law issues. The cited passage reads in pertinent part:

> State courts are bound to apply federal rules in determining the preclusive effect of federal-court decisions on issues of federal law. 512 U.S. at 488 n.9 (citation omitted).

This passage is entirely concerned with the dicta issue in *Heck*, and does not purport to announce any controlling principle for this case.

Gee is presenting a ***state*** law issue in state court. This Court is not generally concerned with state law issues at all, particularly a state law that regulates the state's own conduct as an employer, which is a state sovereign function. Even if there is a federal interest in determining the preclusive effect of a federal court judgment, this case is imbued with predominantly state law issues. No important federal principle prohibits a state court from extending the same issue preclusive effect that a stipulated state court judgment would have, to a stipulated federal court judgment, where the underlying substantive issue is one of state law.

III.

THE STATE COURT'S DECISION IS BASED ON UNIQUE FACTORS AND PRESENTS NO IMPORTANT FEDERAL QUESTION OR CONFLICT OF DECISIONS.

The state court's decision is based on the parties' intent in stipulating to a final judgment of dismissal with prejudice, which assisted Gee's litigation strategy to abandon a doubtful claim in order to save trial costs and appeal other claims that he believed were more promising.

The Court traditionally declines to review such cases where there is no important and embarrassing conflict. *See Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 391 (1923) (Court should only settle issues that are "of importance to the public as distinguished from that of the parties"); *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) (Court sits to resolve important issues that reach beyond the academic or episodic).

The gist of Gee's argument is that an issue must be "actually litigated and determined" in the prior action to be the subject of preclusion. Assuming this is the proper standard, Gee's discrimination issue was "actually litigated" and "actually decided" in the federal court. It was actually litigated for over two years, and was submitted to the court on a complete discovery record, resulting in numerous findings adverse to Gee.

Gee's discrimination issue barely survived summary judgment, and he knew that his chances of winning this issue at the bench trial were likewise "thin." Gee needed a final judgment disposing of all issues and claims to perfect an appeal on other issues. 28 U.S.C. § 1291. He agreed to abandon this issue with prejudice in exchange for the advantage of immediately appealing his other claims.

The difference between "with" and "without" prejudice is important. Gee had no reasonable expectation that his dismissal with prejudice would preserve any discrimination issues for litigation in another forum.

In sum, Gee tested the waters in federal court to the stage of judicial findings on the merits. This satisfies the standard that the issues have been "actually litigated." The federal court first adjudicated Gee's discrimination issue by finding that it was "thin," then adjudicated it as dismissed with prejudice upon

Gee's stipulation. This satisfies the standard that the issues have been "actually decided."

Gee does not contest that his FCRA action presents the same issue as his Title VII action that he concedes is precluded. The issue is the same no matter which authority is cited. *See Gray v. Russell Corp.*, 681 So.2d 310, 312 (Fla. 1st DCA 1996) (FCRA is patterned upon Title VII). *See also Munsey v. General Tel. Co.*, 538 So.2d 1328 (Fla. 2d DCA 1989) (federal court judgment dismissing discrimination action under federal law constitutes issue preclusion and bars similar state law action). Gee's argument is that by stipulating to dismissal with prejudice before trial instead of having the court render the same judgment of dismissal after trial, he can forum shop the same issue in state court, as a requirement of federal law. No important federal policy protects such forum shopping maneuvers, and no recurring issue is presented that requires resolution on the national level.

Gee cites cases in which the courts have declined to give preclusive effect to consent judgments, but none of these cases indicates that the litigants had already litigated the issue to the findings stage, then agreed to a dismissal with prejudice once the court's views were revealed. The federal court judgment was not one "unaccompanied by findings." Gee was fully informed of the court's view of this issue, and knowingly agreed to abandon any rights he may have had as a litigation strategy to obtain the advantage of prompt appellate review of other claims. Gee cites no case dealing with comparable circumstances that requires this Court to harmonize conflicting decisions or address recurring issues.

There is no absolute rule that a consent judgment can never have issue-preclusive effect. On the contrary, both the federal and Florida courts recognize that a consent judgment can have

an issue preclusive effect in some circumstances. *See, e.g., Barber v. Int'l Bhd. of Boilermakers*, 778 F.2d 750, 757 (11th Cir. 1985) (consent judgment held to operate as a collateral estoppel where parties so intended). *See generally* 18 *Moore's Federal Practice* § 132.03[2][ii] at p. 132-88 (3d ed. 1998) ("The contractual origins of consent judgments dictate that the intent of the settling parties controls whether a consent judgment is given preclusive effect. The district court's interpretation of the intent of the parties controls ambiguous passages in a consent judgment."). The treatise and Restatement commentary cited by Gee also recognize this rule.

State law gives a stipulated judgment the same preclusive effect as a judgment after trial. *See Champlovier v. City of Miami*, 667 So.2d 315 (Fla. 1st DCA *en banc* 1995), *rev. den.*, 678 So.2d 337 (Fla. 1996) (consent order creates issue preclusion under state law).

This analysis explains why courts have held that issue preclusion does or does not arise based on the parties' intent and equities of individual cases. In this case, the state courts were competent to determine that the parties intended that any right to litigate the discrimination issue was precluded by the judgment of dismissal with prejudice. There is no reason for this Court to superimpose a heretofore unknown requirement of federal law that supersedes the parties' intent. Nor has Gee shown any reason that this very narrow and non-recurring issue should require national attention.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX 1 — ORDER ON SUMMARY JUDGMENT IN *GEE v. HUMPHRIES, et al., CASE NO. 95-40031 RH (N.D. FLA. DEC. 3, 1996)* OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION FILED DECEMBER 3, 1996

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CASE NO. 95-40031-RH

GERALD GEE,

Plaintiff,

v.

FREDERICK HUMPHRIES, et al.,

Defendants.

ORDER ON SUMMARY JUDGMENT

In this action plaintiff Gerald Gee, formerly an assistant professor at Florida A&M University ("FAMU"), seeks damages and injunctive relief as remedies for a two-week suspension without pay, FAMU's refusal to grant him tenure, and FAMU's refusal to renew his contract. By this order I enter partial summary judgment for the defendants.

Facts

In 1977 Mr. Gee became an assistant professor of journalism at FAMU, one of the ten universities that comprise the state university system of Florida. In 1982, Mr. Gee's

department chairman advised him that his "declining evaluations" and failure to obtain a doctoral degree would raise questions at the time of his expected application for tenure in 1983. Rather than undergo an evaluation for tenure, Mr. Gee accepted a demotion to instructor, thus departing from the tenure track. As Mr. Gee has put it, FAMU then-president Walter Smith "wasn't inclined to approve my tenure application."

Mr. Gee returned to the tenure track in 1989 and, in accordance with the usual schedule for tenure-track faculty members, was expected to apply for tenure in 1994. On August 23, 1993, the dean of his school and director of his division within the school wrote a letter to Mr. Gee stating:

> [Y]ou come up for tenure this year. Unless there have been some productive activities on your part which we do not know about, we are seriously concerned about your ability to receive tenure. You should recall that Dean Ruggles has expressed concern about that in your administrative evaluations at least the last two years. We invite your attention, yet again, to the School's tenure and promotion policy statements.

(Document 169, Exhibit A, Exhibit 22).

Mr. Gee responded by letter dated September 10, 1993. He seemingly acknowledged his "woeful lack of research productivity" but argued this was more than offset by his "record in the areas of teaching and service," a record he said was "substantially better than most on our faculty."

On September 20, 1993, Mr. Gee entered the classroom shortly before the start of his Public Relations Case Studies

("PUR 4001") course. A discussion was in progress among some or all of the 14 students in the class — all of whom were black — regarding whether FAMU provided sufficient opportunities for public relations majors to acquire practical experience. By his own account, Mr. Gee, who is white, said:

> Now I'm going to say something which may upset some of you, because I'm going to use a term that I, myself, consider offensive. What I'm about to say is *not* directed at any of you, or all of you as a class; it's just something I want you to think about . . .
>
> What I want you to be aware of is that in this day and age, a person can't sit around waiting for someone to give them something. Anyone who doesn't take advantage of the opportunities that are there, or who doesn't make opportunities for themselves may be guilty of having what some would call a "nigger mentality" — the sort of thinking that can keep us all on the back of the bus forever.

(Amended and Supplemental Complaint, document 83, at ¶17, ellipses in original). Not surprisingly, the remark caused at least some disruption, both immediately (two students left the class) and for some period thereafter. A number of students complained about Mr. Gee's remarks.

Following an extended investigation of the students' complaints and an opportunity for Mr. Gee to respond, on October 24, 1994, FAMU president Frederick Humphries advised Mr. Gee he would be suspended for two weeks without pay. Mr. Gee initially challenged the suspension through an

administrative appeal but eventually chose to proceed in this court instead.[1]

On November 23, 1994, Mr. Gee submitted an application for tenure. Mr. Gee's dean and division head and the tenure committee of the School of Journalism all recommended denial. The university-wide tenure committee chose to make no recommendation for or against tenure. The provost recommended denial. FAMU president Frederick Humphries reviewed these recommendations and determined to recommend to the Board of Regents that it deny tenure. The Board of Regents accepted that recommendation. By letter dated April 18, 1995, Dr. Humphries advised Mr. Gee that his contract would not be renewed at the end of the spring semester of 1996. Mr. Gee's employment at FAMU ended at that time.

The Claims and Pending Motions

In this lawsuit Mr. Gee contends that his suspension, the denial of tenure and the non-renewal of his contract violated his rights to free speech under the First Amendment, as made applicable to the states by the Fourteenth, because those actions were based in whole or in part on his remarks to students in his PUR4001 class as quoted above. Mr. Gee also contends FAMU denied his rights to procedural due process under the Fourteenth Amendment. Finally, Mr. Gee contends that he was the victim of racial discrimination in violation of the Fourteenth Amendment because, had he been black, he would not have been suspended and would have received tenure. Mr. Gee has

---

1. The appeal substantially delayed service of the suspension. When the suspension actually began, Mr. Gee filed this lawsuit. Apparently in order to moot Mr. Gee's request for a preliminary injunction, FAMU reinstated him prior to service of the entire two week suspension.

named as defendants Dr. Humphries and other FAMU officials (in their individual and official capacities) and all members of the Board of Regents (in their official capacities)

Pending are cross-motions for summary judgment. I hold that FAMU was entitled to take disciplinary action against Mr. Gee based on the racially derogatory remarks he made to his students and that summary judgment therefore should be entered for the defendants on Mr. Gee's First Amendment claim. I hold further that the State of Florida and FAMU afforded Mr. Gee constitutionally adequate procedures in connection with his suspension and that summary judgment therefore should be entered for the defendants on Mr. Gee's procedural due process claim. Finally, I hold that whether Mr. Gee was the subject of racial discrimination is a disputed issue of fact precluding summary judgment on that issue.

First Amendment

Mr. Gee is not, of course, the first public employee to assert he suffered adverse employment action as a result of exercising his First Amendment rights. The well settled law in this circuit subjects such claims to a four-prong test. *See, e.g., Morgan v. Ford*, 6 F.3d 750, 753-54 (11th Cir. 1993), *cert. denied*, __ U.S. __, 114 S.Ct. 2708, 129 L.Ed.2d 836 (1994); *Belveu v. Coosa County Bd. of Educ.*, 998 F.2d 925, 928 (11th Cir. 1993); *Bryson v. City of Waycross*, 888 F.2d 1562, 1565 (11th Cir. 1989). The first prong is fatal to Mr. Gee's First Amendment claim here.

Under this prong, a public employee can prevail on a First Amendment claim alleging adverse employment action only if the speech at issue addresses "a matter of public concern."

Morgan, 6 F.3d at 754. *This is a question of law for the court. Connick v. Myers*, 461 U.S. 138, 148 n.7, 103 S.Ct. 1684, 1690 n.7, 75 L.Ed.2d 708 (1983). Whether speech is on a matter of public concern is to be determined based on the "content, form and context" of the speech at issue. *Connick*, 461 U.S. at 147-48, 103 S.Ct. at 1690.

At a superficial level, Mr. Gee's remark could be characterized as addressing a matter of public concern because it deals with opportunities being provided to students at a public university. But the cases applying this standard make clear that a more comprehensive evaluation is appropriate. From the "content, form and context" of Mr. Gee's comment, it is plain that this was a racially derogatory remark directed at students in Mr. Gee's class. The university constitutionally could, and any university appropriately would, take corrective or disciplinary action against a professor making such a remark. Nothing in the First Amendment precludes a public employer from disciplining employees who, during the course of their public employment, issue this kind of racial invective to those in their charge. *See, e.g., Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (holding that a coach's use of the term "nigger" to "motivate" his players was not speech on a matter of public concern); *Martin v. Parrish*, 805 F.2d 583, 585 (5th Cir. 1986) (holding that professor's use of profanity in order to "motivate" his students was not speech on a matter of public concern).

It is precisely to weed out claims such as Mr. Gee's that public employees must show speech on a matter of public concern as a prerequisite to challenging adverse employment action under the First Amendment. There must be some measure of common sense in the rules that govern public employment.

Appendix 1

As a matter of plain common sense, no employer, public or private, would tolerate this kind of remark. Indeed, tolerating this kind of remark might well subject an employer to civil rights litigation or, at the least, well founded criticism for racial intolerance. The requirement that speech be on a matter of public concern insulates a public employer from liability for enforcing the basic and reasonable standards of conduct that, as a matter of common sense, any employee reasonably can and should be expected to follow.

Mr. Gee suggests, however, that the requirement that speech be on a matter of public concern always is met by speech in a "pedagogic context." I disagree. Moreover, any special treatment afforded the "pedagogic context" would, on balance, cut against Mr. Gee. The university president (and others with authority over the operation of the university) have interests in "academic freedom" just as surely as does an individual professor. Nothing in the First Amendment precludes a university president from determining that, at his or her university, professors will not direct racially derogatory remarks at students. Whatever the contours of "academic freedom," that concept does not immunize professors from review by a university president of remarks such as those at issue here.

Mr. Gee also asserts that FAMU's rule against discrimination and harassment, which FAMU cited as grounds for his suspension, is vague. But a university, like any other public employer, need not have a comprehensive code of conduct to govern its employees; public employees may be disciplined for good cause even without a specific written rule prohibiting the conduct at issue. It should have been obvious to Mr. Gee, from either a reading of the rule at issue or just as a matter of plain common sense unrelated to any written rule,

that this kind of racially derogatory remark could and reasonably would result in corrective or disciplinary action. Mr. Gee could not possibly have thought he was free to direct this kind of remark at his students with impunity.[2]

In sum, defendants are entitled to summary judgment on Mr. Gee's First Amendment claim.

Procedural Due Process

Florida law provided Mr. Gee constitutionally adequate procedures for challenging his two-week suspension. Mr. Gee invoked those procedures initially, appealing his suspension to the Board of Regents. The Board reversed the suspension based on failure to comply with the proper procedures and remanded for future consideration at the university level. When the university again imposed the suspension on remand, Mr. Gee chose to abandon the state procedures in favor of this lawsuit.

Under *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994) (en banc), *cert. denied*, __ U.S. __, 115 S.Ct. 898, 130 L.Ed.2d 783 (1995), a plaintiff cannot forego adequate state remedies for a federal procedural due process claim. Florida law provided Mr. Gee extensive procedural rights, far exceeding the requirements of due process, as well as adequate remedies for any departure from the required procedures, including the right to eventual review in the Florida First District Court of

2. The likelihood of discipline was so clear that, indeed, one could reasonably posit that Mr. Gee calculatedly made the remark as a basis for this lawsuit challenging the adverse tenure decision that he knew was probably coming anyway. Whether this is so, however, is a disputed issue of fact, and I give no weight to this possibility in resolving the pending summary judgment motions.

Appeal and possibly the Florida Supreme Court. Accordingly, under *McKinney*, Mr. Gee's procedural due process claims are clearly unfounded.

Mr. Gee tries to avoid *McKinney* on the grounds that FAMU allegedly failed to follow the applicable rules or somehow kept him from invoking Florida's undeniably adequate set of administrative remedies. But even if true, this would mean only that Mr. Gee would have had to invoke the procedures available under Florida law to correct such errors. Under *McKinney*, a litigant to whom such procedures are available — that is, to whom the state affords a right to due process — simply has no claim for denial of due process.

Equal Protection

Mr. Gee asserts the defendant FAMU officials recommended the denial of tenure because Mr. Gee is white. Mr. Gee claims the FAMU officials repeatedly changed the tenure requirements, in effect raising the bar each time he appeared ready to clear it. Mr. Gee cites Dr. Humphries' letter to Mr. Gee referring to him as a "white professor" and a Wall Street Journal article quoting Dr. Humphries as saying Mr. Gee would have been treated differently had he been black.[3]

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3. Mr. Gee has provided no sworn support for his assertion that Dr. Humphries made such a remark. Mr. Gee asserts, however, that the reason he has not done so is that, under Eleventh Circuit precedent, he supposedly can rely on the newspaper story. I need not resolve this issue because there is a disputed issue of fact on the Equal Protection claim with or without the newspaper story. I note, however, that the law on this is not nearly so clear as Mr. Gee claims. *See, e.g., McMillian v. Johnson*, 88 F.3d 1573, 1583-85 (11th Cir. 1996).

Appendix 1

Defendants assert that Dr. Humphries referred to Mr. Gee as a "white professor" only in discussing Mr. Gee's racial invective to his black students. They correctly note that, in the context of a racial vulgarity, the race of the speaker may affect the meaning and import of the remark. But whether this fully explains Dr. Humphries' remark probably is a question for a jury, and in any event Mr. Gee also points to evidence that FAMU provided different explanations of what he needed to do to obtain tenure or why his efforts in that regard fell short of the mark.

In short, while Mr. Gee's evidence on this claim is thin, it is sufficient to withstand defendants' motion for summary judgment.

Proper Defendants

Mr. Gee has sued various FAMU officials in their individual and official capacities and the members of Florida's Board of Regents in their official capacities. Mr. Gee seeks, among other things, damages and injunctive relief.

It is impossible to determine from Mr. Gee's Amended and Supplemental Complaint whether he seeks damages against any defendant in his or her official capacity. Any such claim, however, clearly would be barred by the Eleventh Amendment. Accordingly, I will enter summary judgment for the official capacity defendants with respect to any claim for damages.

If Mr. Gee prevails on his racial discrimination claim, he may be entitled to injunctive relief. To the extent he seeks such relief against the FAMU defendants in their official capacities, it is obvious that any such relief to which Mr. Gee may become

entitled can be adequately provided by means of an injunction against the president of FAMU in his official capacity. Any such injunction would bind not only the president but also FAMU's employees and those in active concert with them, so long as they received notice of the injunction, as could easily be assured. *See, e.g.*, Fed. R. Civ. P. 65(d). There is therefore absolutely no reason to retain any of the other FAMU defendants as parties in their official capacities. The motion of the FAMU defendants other than Dr. Humphries for summary judgment on the claims against them in their official capacities thus will be granted.

Mr. Gee also has sued the FAMU defendants in their individual capacities. They have moved for summary judgment based on qualified immunity. Their qualified immunity defense need not be considered with respect to Mr. Gee's First Amendment and procedural due process claims because on those claims I have determined to enter summary judgment for all defendants on the merits. With respect to Mr. Gee's Equal Protection claim, the law has long been clearly established that taking adverse employment action based on an employee's race is unconstitutional. If, as Mr. Gee alleges, that is what happened, then defendants will not be entitled to qualified immunity. In short, this is simply a factual dispute, and defendants' motion for summary judgment based on qualified immunity thus will be denied.

Finally, the members of the Board of Regents have moved to dismiss the Amended and Supplemental Complaint. They assert they did nothing wrong. But if, as Mr. Gee alleges, he would have received tenure but for his race, he will be entitled to appropriate injunctive relief against the members of the Board of Regents. Their motion to dismiss thus will be denied.

Appendix 1

Accordingly,

IT IS ORDERED:

1. Defendants' motions for summary judgment (documents 123, 126, 166 and 169) are GRANTED IN PART and DENIED IN PART. Summary judgment is entered in favor of all defendants on plaintiff's First Amendment and Due Process claims. Summary judgment is entered in favor of all official capacity defendants on all claims for damages. Summary judgment is entered in favor of all FAMU defendants in their official capacities, other than Dr. Humphries, on all claims for injunctive and declaratory relief. Summary judgment is denied on plaintiff's Equal Protection claims for injunctive relief against Dr. Humphries. Summary judgment is denied on plaintiff's Equal Protection claims for damages against the FAMU defendants in their individual capacities.

2. Plaintiff's motion for partial summary judgment (document 98) is DENIED.

3. The motion of the defendant members of the Board of Regents to dismiss (document 95) is DENIED.

SO ORDERED this 2d day of December, 1996.

s/ Robert L. Hinkle
Robert L. Hinkle
United States District Judge

APPENDIX 2 — GEE'S MOTION TO VOLUNTARILY DISMISS WITH OR WITHOUT PREJUDICE IN *GEE v. HUMPHRIES, et al.*, CASE NO. 95-40031 (N.D. FLA.) IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA FILED JANUARY 29, 1997

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

CASE NO. 95-40031-WS

GERALD GEE,

Plaintiff,

-against-

FREDERICK HUMPHRIES, BISHOP HOLIFIELD, CARRIE GAVIN, NELLIE WOODRUFF, ROBERT ROLLINS, RICHARD HOGG, JAMES HECKIN, JR., ELIZABETH LINDSAY, AUDREA ANDERSON, JULIAN BENNETT, JR., FRANK BROGAN, PAUL CEJAS, CHARLTON DANIEL, JR., PERLA HANTMAN, GWENDOLYN McLIN, JON MOYLE, DENNIS ROSS, STEVEN UHLFELDER, WELCOM WATSON, and CORNELIA SHA'RON JAMES,

Defendants.

MOTION TO VOLUNTARILY DISMISS

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, plaintiff moves to voluntarily dismiss the Second Claim in his Amended and Supplemental Complaint (the

"Complaint"), either with or without prejudice, against all defendants.[1] In support of that motion, plaintiff states:

1. The Complaint asserted three claims against the A&M Defendants. In November 1995, at the insistence of the A&M Defendants, the Board Defendants were added to the Complaint as parties whose inclusion might be needed to afford plaintiff complete relief. In its decision and order dated December 2, 1996 (the "December 2 Order"), this Court granted the A&M Defendants' motion for summary judgment in part, dismissing the First and Third Claims in the Complaint.

2. Plaintiff and his attorneys, who have been representing plaintiff on a pro bono basis, already have expended significant time and effort on this litigation. Plaintiff wishes to appeal the December 2 Order as expeditiously as possible. In order to do so, he must dismiss the Second Claim so that a final appealable judgment can be entered in this case.

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1. On December 20, 1996, plaintiff served a notice of voluntary dismissal (the "Notice") pursuant to Fed. R. Civ. P. 41(a)(1) against the Board Defendants. The Board Defendants' time to answer after denial of their motion to dismiss was December 17, 1996. *See* Fed. R. Civ. P. 12(a)(4)(A) and 6(a). By order dated December 17, 1996, this Court granted the Board Defendants an extension until December 23, 1996 to answer the Complaint. Because defendants served their answer before the last day it could have been served, it preceded the filing of plaintiffs Notice. By order dated December 31, 1996, this Court treated plaintiffs Notice as a motion pursuant to Rule 41(a)(2) to dismiss without prejudice against the Board Defendants. By this motion, plaintiff specifically seeks (1) to voluntarily dismiss his Second Claim against the A&M Defendants, and (2) to voluntarily dismiss his Second Claim against the Board Defendants with prejudice as an alternative to dismissal without prejudice.

Appendix 2

3. As shown in the memorandum of law that follows, defendants will not be prejudiced in any legally cognizable way.

For the foregoing reasons, plaintiff asks that his motion to voluntarily dismiss the Second Claim in the Complaint, either with or without prejudice, be granted.

Memorandum Of Law

Under Fed. R. Civ. P. 41(a)(2), this Court is authorized to voluntarily dismiss plaintiffs Second Claim at his request. Here, circumstances warrant dismissal. Plaintiff has been represented by attorneys working on a pro bono basis on his behalf. Two of the three claims he raised in this action have been dismissed, and, to minimize the costs associated with this litigation, he wishes to appeal the order dismissing those claims as soon as possible.

The only prejudice relied upon by defendants' opposing papers is the possibility of these claims being relitigated in a subsequent action. This is generally an inadequate basis for denying a motion to voluntarily dismiss without prejudice. *Fisher v. Puerto Rico Marine Management. Inc.* 940 F.2d 1502, 1502-03 (11th Cir. 1991) ("in most cases a voluntary dismissal should be allowed unless the defendant will suffer some plain prejudice other than the mere prospect of a second lawsuit" citing *Durham v. Florida East Coast Rv. Co.*, 385 F.2d 366, 368 (5th Cir. 1967)).

Even if dismissal without prejudice were deemed detrimental to defendants' interests, plaintiff now seeks, in the alternative, dismissal with prejudice. Legal claims dismissed with prejudice cannot be relitigated, and Courts have held that

district courts have no discretion to deny an application to dismiss with prejudice since it would force a plaintiff to proceed with an action that the plaintiff prefers to drop. *See, e.g., Smoot v. Fox*, 340 F.2d 3 01. 303 (6th Cir. 1964) (writ of mandamus granted where district court denied motion to voluntarily dismiss action with prejudice; "We know of no power in a trial judge to require a lawyer to submit evidence on behalf of a plaintiff, when he considers he has no cause of action or for any reason wishes to dismiss his action with prejudice, the client being agreeable. A plaintiff should have the same right to refuse to offer evidence in support of his claim that a defendant has"); *Schwarz v. Follader*, 767 F.2d 125, 129-30 n.5 (5th Cir. 1985). *See generally* 9 Charles A. Wright & Arthur R. Miller, Federal Practice And Procedure, § 2367 (2d ed. 1995) ("If the plaintiff moves under Rule 41(a)(2) for voluntary dismissal, specifically requesting dismissal with prejudice, it has been held that the district court must grant that request").

Conclusion

For the foregoing reasons, plaintiffs motion should be granted.

Dated: January 28, 1997

Respectfully submitted,

s/ Michael E. Rosman
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Appendix 2

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Certification

Pursuant to Local Rule 7.1(B), I have conferred with opposing counsel in a good faith effort to resolve the issues raised by this motion, without success.

s/ Michael E. Rosman
MICHAEL E. ROSMAN

APPENDIX 3 — STIPULATION FOR VOLUNTARY DISMISSAL IN *GEE v. HUMPHRIES, et al.*, CASE NO. 95-40031 RH (N.D. FLA.)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CASE NO.: 95-40031-WS

GERALD GEE,

Plaintiff,

vs.

FREDERICK HUMPHRIES, BISHOP HOLIFIELD, CARRIE GAVIN, NELLIE WOODRUFF, ROBERT ROLLINS, and RICHARD HOGG,

Defendants.

STIPULATION OF VOLUNTARY DISMISSAL

Pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, Plaintiff and Defendants hereby stipulate to the dismissal of the Second Claim in Plaintiff's Amended and Supplemental Complaint with prejudice. Each party will bear his or its own fees and costs in this action.

Respectfully submitted,

s/ Marie A. Mattox
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NELLIE WOODRUFF, ROBERT
ROLLINS, and RICHARD HOGG

APPENDIX 4 — ORDER APPROVING DISMISSAL AND JUDGMENT OF DISMISSAL IN *GEE v. HUMPHRIES, et al.*, CASE NO. 95-40031 (N.D. FLA. FEB. 5, 1997) IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION FILED FEBRUARY 5, 1997

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CASE NO. 95-40031-RH

GERALD GEE,

Plaintiff,

v.

FREDERICK HUMPHRIES, et al.,

Defendants.

ORDER APPROVING DISMISSAL

The parties having stipulated to voluntary dismissal of the only remaining claim in this matter, the clerk shall enter judgment dismissing all of the plaintiff's claims with prejudice and shall close the file.

SO ORDERED this 3d day of February, 1997.

s/ Robert L. Hinkle
Robert L. Hinkle
United States District Judge

Appendix 4

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Case No. 95-40031-RH

GERALD GEE,

vs.

FREDERICK HUMPHRIES, et al.,

JUDGMENT

Pursuant to and at the direction of the Court, it is ORDERED AND ADJUDGED that this action be DISMISSED WITH prejudice.

Dated February 5, 1997, at Tallahassee, Florida.

ROBERT A. MOSSING, CLERK
s/ Pam Kuminkoski
By Deputy Clerk: PAM KUMINKOSKI

ENTERED ON DOCKET 2/5/97 BY PK
(Rules 58 & 79(a) FRCP or 32(b)(1) & 55 FRCRP)

Copies mailed to: MATTOX, GRANBERRY, QUILLEN, WALLBERG, MATTIMORE, MCKNIGHT, TURNER, ROBERTS, ROSMAN, COB 1997, VJR, SS

APPENDIX 5 — ORDER DENYING WRIT OF CERTIORARI IN *GEE v. HUMPHRIES, et al.*, CASE NO. 98-44 (U.S. SUP. CT. OCT. 5, 1998) DATED OCTOBER 5, 1998

GEE, GERALD v. HUMPHRIES, FREDERICK, ET AL.

98-44

SUPREME COURT OF THE UNITED STATES

1998 U.S. LEXIS 5604

October 5, 1998, Decided

JUDGES: [*] Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

OPINION: The petition for a writ of certiorari is denied.

APPENDIX 6 — EXCERPT (pp. 8-9) FROM STATE BOARD OF REGENTS' BRIEF TO DISTRICT COURT OF APPEAL IN *GEE v. BOARD OF REGENTS*, CASE NO. 97-3061 (FLA. 1ST DCA)

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

DCA Case No. 97-3061
L.T. Case No. 96-3741

GERALD GEE,

Appellant,

vs.

STATE OF FLORIDA, BOARD OF REGENTS,

Appellee.

APPELLEE'S ANSWER BRIEF

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Attorney for Appellee,
State of Florida, Board of Regents

* * *

Appendix 6

SUMMARY OF THE ARGUMENT

Gee sought the federal court's dismissal of his Equal Protection claim with prejudice. This final adjudication benefited Gee by enabling him to appeal other, more promising claims. This strategy gave up very little, as the federal judge who was to be the fact-finder had already determined that Gee's suspension was justified, his tenure qualifications were doubtful, and his evidence of race discrimination was "thin." He knew that dismissal with prejudice would bar relitigating the same claim in the state court as a Title VII action or a Florida Civil Rights Act claim.

Gee's Equal Protection/race discrimination claim is identical to his Title VII and FCRA claims. Each asserts the same denial of tenure based upon illegal race considerations. In fact, Gee used his federal court pleading as his EEOC complaint, which in turn formed the basis for this action. He admitted in the federal court that the same evidence that would support or defeat his Equal Protection claim would apply to his Title VII/FCRA claims.

Collateral estoppel precludes the relitigation of Gee's Title VII and FCRA claims. Gee raised the same issue and had a full and fair opportunity to litigate it in his federal action. He had complete discovery and obtained findings that his claim barely survived summary judgment. In short, he tested the water and finding the current was strong against his position, chose to confirm his claim's lack of merit by voluntarily dismissing it with prejudice by final adjudication of the Court.

Gee's Title VII claim is barred not only by collateral estoppel but also by res judicata. This doctrine applies whenever

there is a final judgment on the merits by a court of competent jurisdiction, and the parties and the claim are the same. Here, Gee's voluntary dismissal with prejudice constitutes a final adjudication on the merits, the federal court was a court of competent jurisdiction, and the parties and claim in both the actions are identical. Gee should not be permitted to relitigate the claim that he agreed should be dismissed with prejudice in an earlier proceeding.

The Board was not required to give Gee advance notice of its defenses before such defenses ripened. Nevertheless, Gee had repeated actual notice that the Board would invoke the res judicata and collateral estoppel defenses in the state court proceeding based upon the adjudication of the federal action. Gee was not surprised when the Board asserted these defenses in its state court Motion for Summary Judgment.

Gee initially chose the federal court as the most favorable forum to litigate his Equal Protection claim. If he had won there, he would undoubtedly be claiming res judicata and collateral estoppel against the Board. He chose instead to abandon that claim with prejudice after receiving adverse findings, as a strategic maneuver to enable him to pursue other claims. He cannot ask the Court to relieve him of the legal consequences that he actually knew would arise from his strategy in the federal action.

* * *

APPENDIX 7 — OPINION OF AFFIRMANCE IN *GEE v. STATE BOARD OF REGENTS*, CASE NO. 97-3061 (FLA. 1ST DCA APRIL 20, 1998)

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 97-3061

GERALD GEE,

Appellant,

v.

STATE OF FLORIDA, BOARD OF REGENTS,

Appellee.

Opinion filed April 20, 1998.

An appeal from the Circuit Court for Leon County.
William L. Gary, Judge.

Marie A. Mattox, Mattox & Hood, P.A., Tallahassee, for Appellant.

David K. Miller, of Broad & Cassel, Tallahassee, for Appellee.

PER CURIAM.

Appendix 7

AFFIRMED

MICKLE and DAVIS, JJ., MCDONALD, PARKER LEE, SENIOR JUDGE, Concur.

APPENDIX 8 — EXCERPT (pp. 4-5) FROM BOARD OF REGENTS' RESPONSE TO MOTION FOR REHEARING IN *GEE v. STATE BOARD OF REGENTS*, CASE NO. 97-3061 (FLA. 1ST DCA)

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

DCA Case No. 97-3061
L.T. Case No. 96-3741

GERALD GEE,

Appellant,

vs.

STATE OF FLORIDA, BOARD OF REGENTS,

Appellee.

APPELLEE'S RESPONSE TO MOTION FOR REHEARING, MOTION FOR REHEARING EN BANC, AND MOTION FOR CERTIFICATION

The State Board of Regents opposes Gee's motions and says:

* * *

ARGUMENT

Gee is forum-shopping. He tested the water in the federal action and felt the current was against him. He then made a strategic maneuver to jettison his discrimination claim in order

to appeal other claims that he thought were more promising. Now he wants the state courts to decide the issue that he abandoned. The Court correctly dismissed his action as a routine preclusion decision that does not merit any extraordinary judicial attention.

Collateral estoppel (issue preclusion). Gee's federal action involved the same discrimination issue as his state court action. The equal protection, Title VII and Chapter 760 claims all base liability on proof of race discrimination in employment. Title VII simply implements the equal protection clause, and Chapter 760 is modelled on Title VII. Once discrimination or its absence has been determined, this issue cannot be contested again in a new forum.

Because this essential liability issue was decided adverse to Gee in the prior federal action, he cannot raise it again in an action in state court. *See Munsey v. General Telephone Co.*, 538 So.2d 1328 (Fla. 2d DCA 1989), holding that the employee's unsuccessful federal action under Title VII estopped her from pursuing the issue under a state law, and describing the argument that Gee makes here as "groundless." *Id.* at 1330.

At oral argument the Court panel specifically asked if *Munsey* could be distinguished. Gee's counsel was unable to distinguish the case then, and still has not done so.

Gee actually litigated the race discrimination issue through the findings stage, then chose, in exchange for other strategic advantages, to abandon the issue with prejudice. He knew the Board would allege a preclusion defense if he pursued the issue in state court, but did not reserve any rights. He presents no evidence that anything less than a preclusive ruling was

intended. This estops him from litigating the issue again. *See Barber v. Int'l Bhd. of Boilermakers*, 778 F.2d 750, 757 (11th Cir. 1985) (consent judgment held intended to operate as collateral estoppel); *I.A. Durbin, Inc. v. Jefferson Nat'l Bank*, 793 F.2d 1541, 1549 (11th Cir. 1986) (actual litigation and a full and fair opportunity to litigate sufficient); *see also Champlovier v. City of Miami*, 667 So.2d 315 (Fla. 1st DCA *en banc* 1995), *rev. den.*, 678 So.2d 337 (Fla. 1996) (consent order creates collateral estoppel).

Gee's citations do not hold otherwise. In *Wilwording v. Swenson*, 502 F.2d 844 (8th Cir. 1974), a *pro se habeas corpus* case where the standard of preclusion is relaxed, the Court acknowledged that a prior dismissal with prejudice was still an estoppel if it involved the intentional abandonment of a known right. *Id.* at 849-50. Likewise, in *EEOC v. Jacksonville Shipyards*, 696 F. Supp. 1438 (M.D. Fla. 1988), an employment discrimination case, the Court held that "a full and fair opportunity to litigate the issues" sufficed as a basis for collateral estoppel. *Id.* at 1442 n. 7.

Gee agreed to the entry of the federal judgment after findings were made and a "full and fair opportunity to litigate" provided. His consent binds him the same as a judgment rendered after trial.

* * *

APPENDIX 9 — ORDER DENYING REHEARING IN *GEE v. STATE BOARD OF REGENTS*, CASE NO. 97-3061 (FLA. 1ST DCA JUNE 5, 1998)

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (850) 488-6151

June 5, 1998

CASE NO: 97-03061

L.T. CASE NO. 96-3741

Gerald Gee

Appellant(s),

v.

State of Florida, Board of Regents

Appellee(s).

BY ORDER OF THE COURT:

Appellant's motions for rehearing, for certification, and for rehearing en banc, filed May 4, 1998, is DENIED.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

s/ Jon S. Wheeler
Jon S. Wheeler, Clerk

Appendix 9

By: s/ Rhonda Causseaux
Deputy Clerk

Copies:

Marie A. Mattox
David Allen Roberts

M. Stephen Turner
David K. Miller